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VRG PROPERTIES COMPANY



BEFORE THE CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of

CLEANUP AND ABATEMENT ORDER NO.
R5-2008-0702 FOR RESTRUCTURE
PETROLEUM MARKETING SERVICES INC;
VRG PROPERTIES COMPANY AND JEM1.
FORMER "FILL'EM FAST"; 1017 DOUGLAS
BOULEVARD, ROSEVILLE, PLACER
COUNTY; and MONITORING AND
REPORTING PROGRAM ORDER NO. R5-
2008-0809; CALIFORNIA WATER CODE
SECTION 13267 FOR RESTRUCTURE
PETROLEUM MARKETING SERVICES INC;
VRG PROPERTIES COMPANY AND JEM1.
FORMER "FILL'EM FAST"; 1017 DOUGLAS
BOULEVARD, ROSEVILLE, PLACER
COUNTY

Petition No.:

**PETITION FOR REVIEW OF ORDERS
R5-2008-0702 AND R5-2008-0809**

[WATER CODE, § 13320(A) AND
23 CAL. CODE REGS., § 2050 ET SEQ.]

DATE PETITION FILED: MAY 5, 2008

INTRODUCTION

VRG Properties ("VRG") hereby timely files this petition for review of Regional Water Quality Control Board -- Central Valley ("Regional Board") Cleanup and Abatement Order No. R5-2008-0702 (the "CAO") and Monitoring and Reporting Program Order No. R5-2008-0809 (collectively, the "Orders").¹ VRG, the successor in interest to the former lessee of property located at 1017 Douglas Boulevard, Roseville, California ("Roseville Site"), was recently named as a "Discharger" under the Orders. The Orders were issued after more than five months of silence from the Regional Board, without responses or an explanation as to the reasons that Regional Board Staff ignored VRG's previously submitted comments, and without the benefit of a hearing. The inclusion of VRG as a Discharger under these Orders without any distinction between primary and secondary responsible parties was decidedly unexpected, and inconsistent with the facts and circumstances of the investigation and clean-up of the Roseville Site. Unfortunately, it appears the Regional Board's real reason for naming VRG as Discharger is not for any contamination that it or its predecessors was alleged to have released, but for the primary purpose of exerting leverage on the truly responsible Discharger.

Further, the compliance dates set in the Orders can only be properly characterized as arbitrary and capricious as they relate to VRG.² And, the CAO specifies improper cleanup targets that are economically and technically infeasible to achieve, without any clear findings in the CAO, referencing and based on substantial evidence in the record that the stringent targets are required to protect beneficial uses or water quality standards set forth in the Basin Plan applicable to affected groundwater. Finally, procedural errors made in issuance of the Orders were substantial and effectively deprived VRG of due process.

Accordingly, VRG appeals these Orders on the basis that: (1) the Regional Board should have designated Restructured Petroleum Marketing Services, Inc. ("RPMS"), the party currently active in

¹ VRG is the successor in interest to Autotronic Systems Incorporated ("ASI"), former tenant at the Roseville Site until 1985. As further explained in the Orders and in the November 15, 2007 letter, which is attached hereto as Exhibit A, the fee owners of the Roseville Site at the time of the ASI lease were Raymond and Marjorie Lieser, who are succeeded in fee interest by JEM1 LLC ("JEM1"), current fee owner of the Roseville Site. The November 15, 2007 letter, and all comments and requests for revisions presented to the Regional Board in that correspondence, are hereby incorporated by reference into this correspondence and attached hereto as Exhibit A.

² VRG has filed a Request for Stay concurrent with this application to address the unreasonable deadlines set forth in the Orders. As explained in the request for stay, VRG was ordered to take the place of an existing discharger that has been conducting tank removal actions, site investigations and remediation activities since 1992.

1 remediating the Roseville Site, successor in interest to the primary operator, and factually, contractually
2 and under applicable law, regulation and guidance the party primarily responsible for the condition of
3 pollution at the Roseville Site, and JEM1, the current property owner and successor in interest to the fee
4 owner of the Roseville Site at the time of discharge, as primarily responsible parties, and VRG as a
5 secondarily responsible party; (2) the compliance schedule in the Orders, and particularly the initial
6 compliance date of June 6, 2008, are infeasible for VRG to comply with, because *inter alia*, the
7 compliance schedule mandates performance of substantial remediation work only *sixty-two* days after
8 the Orders were issued and *less than sixty* days after VRG received notice that the Orders were issued;
9 and (3) VRG was deprived of due process by a number of procedural errors made in issuing the Orders,
10 including the Regional Board's failure to adequately respond to VRG's comments on draft versions of
11 the Orders prior to finally issuing them, and its failure to provide VRG with an opportunity for an
12 evidentiary hearing before the Board.

13 **I. PETITIONER** (Cal. Code Regs., tit. 23, § 2050, subd. (a)(1)).

14 VRG's contact mailing address, telephone number and email address are as follows:

15
16 Darren W. Stroud, Esq.
Environmental, Safety & Regulatory Affairs Counsel
THE VALERO COMPANIES
17 One Valero Way
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18 Telephone: (210) 345-2871
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19 Darren.Stroud@valero.com

20 **II. ACTION TO BE REVIEWED** (Cal. Code Regs., tit. 23, § 2050, subd. (a)(2)).

21 VRG seeks review of the Regional Board Order Nos. R5-2008-0702 and R5-2008-0809 that
22 improperly designate VRG as a discharger that is responsible for taking over the clean up activities of
23 the primarily responsible party, mandate a compliance schedule and clean up targets that are infeasible
24 for VRG to meet, and which were issued in a manner that violated VRG's rights to due process and
25 procedural protections.
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1 **III. DATE OF ACTION** (Cal. Code Regs., tit. 23, § 2050, subd. (a)(3)).

2 The first date that the Regional Board could be considered to have issued the Cleanup and
3 Abatement Order No. R-5-2008-0702 and Monitoring and Reporting Order No. R5-2008-0809 is April
4 3, 2008.³

5 **IV. STATEMENT OF REASONS** (Cal. Code Regs., tit. 23, § 2050, subd. (a)(4)).

6 **A. The Regional Board Improperly Named VRG as A Primarily Responsible Party.**

7 The Regional Board improperly named VRG as a primary responsible party, and inclusion of
8 VRG as a discharger under these Orders without identifying VRG as a secondary responsible party was
9 arbitrary and capricious because the Regional Board ignored the mandates of State Board Policy No. 92-
10 49 ("Policy 92-49") and failed to consider the factors required by *In the Matter of Petition for Review*
11 *Wenwest, Inc, Susan Rose, Wendy's International, and Phillips Petroleum*, Order No. WQ 92-13
12 ("Wenwest"), *In the Matter of Petition of Prudential Insurance of America*, Order No. WQ 87-6
13 ("Prudential") and *Petition of John Stuart*, Order No. WQ 86-15 ("Stuart") when adopting the Orders.
14 The failure to identify RPMS and JEM1 as primarily responsible parties and to specify VRG as a
15 secondarily liable party is improper under State Board Precedent for a number of reasons.

16 First, ASI had only a very limited, single release (on the order of gallons) over a defined three
17 month period of time, and upon learning of a one-time leak, petitioner quickly repaired the leak. And,
18 technical reports show that it is unlikely that a substantial portion of the 698 gallons of petroleum from
19 the filling line impacted the soil and groundwater beneath the Roseville Site. Second, both ASI,
20 predecessor to VRG, and EZ-Serve, predecessor to RPMS held a leasehold interest but ASI held the
21 leasehold interest at the time of its own, quite limited release and EZ-Serve held this interest subject to
22 the ASI release, and at the time of its own, far more major release. Third, ASI had notice only of its
23 limited discharge, and, after 1985, EZ-Serve acquired all environmental liability and responsibility, and
24 indemnified ASI from any environmental liability that might arise during EZ-Serve operations, and thus,

25 ³ The Orders available electronically set forth an adoption date of June 8, 2008, but VRG has confirmed that the Regional
26 Board intended to issue the Orders April 3, 2008. Further, Regional Board Staff denied VRG's request for an
27 evidentiary hearing before the Board for re-consideration and amendment of the Orders by letter dated May 2, 2008,
28 which is attached hereto as Exhibit F, which denial might be more appropriately considered the date of final action by
the Regional Board with respect to the Orders. However, because the compliance schedule specified in the Orders is
infeasible, and VRG critically needs a stay of at least the initial compliance date for purposes of avoiding potential civil
and criminal enforcement, VRG has chosen to file this petition prior to the expiration of the 30-day period commencing
May 2, 2008.

1 there is no indication in the materials available to date that ASI knew, or had reason to know of the
2 major EZ-Serve release prior to the beginning of full-scale remediation efforts by EZ-Serve sometime
3 after 1992. Further, at the time of the major discharge by EZ-Serve, ASI had no interest in the Roseville
4 Site, and no connection to, or authority over EZ-Serve that would have allowed ASI to prevent or
5 remediate the major discharge contributing to contamination of groundwater at the site, which resulted
6 from releases during the period that EZ-Serve operated the site. Fifth, there are multiple responsible
7 parties who are also named in the Order, and of those parties, VRG is the *only* party without sufficient
8 legal access to the Roseville Site to proceed with remedial activities. Sixth, because EZ-Serve, and later
9 RPMS, assumed all environmental liability and indemnified ASI and VRG, neither ASI nor VRG have a
10 legal obligation to carry out the cleanup, unless and until the primary responsible party fails to do so.
11 Seventh, according to public records, RMPS's consultants indicate that the site investigation and
12 cleanup are progressing in an orderly fashion. For the foregoing reasons, VRG is entitled to a
13 designation as a secondarily responsible party; this conclusion is inconsistent with State Board decisions
14 in analogous situations.

15 The failure to identify RPMS and JEM1 as primarily responsible parties and to specify VRG as a
16 secondarily liable party is also improper under Policy 92-49 because, pursuant to that policy, a
17 prerequisite to naming VRG as a Discharger, Regional Board Staff were required to demonstrate that
18 VRG (and/or its predecessors in interest from whom environmental liability may be imputed) caused or
19 permitted the current contamination of the Roseville Site. The Regional Board has not demonstrated
20 that to be the case. In fact, monitoring well data from the mid-1980s shows non-detects or a "minute
21 quantity" of petroleum in groundwater in the immediate vicinity of ASI's relatively small fuel line leak,
22 and a geohydrologic study conducted by ASI indicated minimal risk of adverse impacts to groundwater.
23 According to environmental reports recently found by VRG, the product released from the filling line
24 leak traveled through nearby utility conduits to nearby utility vaults. The petroleum product in the
25 utility vaults were quickly removed and had no detectable impact on the environment. (See Report on
26 Monitoring Well Installation, dated May 30, 1984 to Mr. Alex Evins of Diamond Shamrock Corporation
27 from Law Engineering Testing Company, attached hereto as Exhibit E). According to the Law
28 Engineering Report, the petroleum contamination detected in the groundwater at the Roseville Site in

1 1985 came from a source upgradient of the Roseville Site USTs (*i.e.*, the nearby Regal Gas Station).
2 Law Engineering reached this conclusion because the monitoring wells upstream of the USTs contained
3 elevated levels of petroleum contamination, while the monitoring wells downstream of the USTs had no
4 detectable levels of hydrocarbon contamination. Moreover, any fuel spilled in 1983 has had
5 approximately 25 years to naturally attenuate and vaporize from the soil to the air. Thus, there is
6 insufficient evidence in the record that the current site contamination was caused by anything other than
7 EZ-Serve and their long term operation of, releases from, and abandonment of three underground
8 storage tanks at the Roseville Site.

9 Rather than establishing the status of VRG as a responsible party as required by law, the
10 Regional Board has told VRG that staff believes that, although RPMS is more properly the primarily
11 responsible party and that RPMS will ultimately complete the required cleanup activities, the Regional
12 Board, is not satisfied with the timeliness of RPMS's reports and disagrees with RPMS regarding certain
13 technical issues concerning cleanup methodologies, and thus the Regional Board Staff named VRG as a
14 discharger to put pressure on RPMS to more closely follow the Regional Board's orders. VRG's
15 potential ability to pressure RPMS is not appropriate grounds for naming VRG a primarily liable party,
16 particularly when the Regional Board has far more efficient and effective enforcement powers and tools
17 under the Porter-Cologne Act to assure prompt performance by RPMS, but has yet to use its own
18 enforcement powers to expedite cleanup of the Site by RPMS. While VRG is willing to cooperate with
19 the Regional Board,⁴ requiring VRG to comply with the requirements of an order that another
20 potentially responsible party is willing and able to complete is inconsistent with the California Water
21 Code § 13000 et seq ("CWC").

22 Pursuant to *Wenwest*, *Prudential* and Policy 92-49, VRG should be designated as a secondarily
23 responsible party and only be required to fulfill the requirements of the Orders if the primarily
24 responsible parties are unable or unwilling to fulfill their obligations under the Orders and after
25 appropriate enforcement action against RPMS has been completed. The Orders, as drafted, require
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28 ⁴ VRG expressed its willingness to assist the Regional Board in its November 15, 2007 letter (attached hereto as Exhibit A)
and more recently, in its April 29, 2008 letter (attached hereto as Exhibit B).

1 VRG to expend substantial resources to participate in investigation, monitoring, characterization and
2 cleanup activities that duplicate, and overlap those performed by RPMS.

3 **B. The Orders are Arbitrary and Capricious Because the Time Schedule Requirements**
4 **are Unreasonable and Infeasible.**

5 The Orders are arbitrary and capricious in that they set forth time-scheduled requirements that
6 are unreasonable and impossible to meet for a party that has no history with this Roseville Site.
7 Specifically, the first compliance deadlines for completion of significant substantive requirements,
8 including the preparation of complex studies and implementation of corrective action plan actions, are
9 due by June 6, 2008. VRG, an entity that has had no involvement with the Roseville Site for at least 23
10 years, currently has no site access rights necessary to perform the tasks articulated in the Orders.

11 In particular, compliance with the first compliance schedule deadline, June 6, 2008 is infeasible.
12 The Orders mandate that, by June 6, 2008, several substantial tasks and requirements must be
13 completed, including the following: preparation of a detailed site chronology (CAO § 3, page 8);
14 completion and preparation of a report on the results of the "HVDPE and AS Test" arising out of a
15 February 14, 2008 directive to prepare a workplan that was never sent to VRG (CAO § 4, page 8);
16 development and implementation of a "modified Corrective Action Plan" (CAO § 4, page 8);
17 development and implementation of a work plan to conduct a human health risk assessment (CAO § 4,
18 page 10), develop a public participation plan, and conduct sampling, monitoring and reporting at the
19 Roseville Site. Compliance with these obligations is infeasible for VRG because neither VRG nor its
20 predecessor in interest have had any involvement with the Roseville Site for more than 20 years.⁵ Based
21 on its lack of connection to, and involvement with the Roseville Site, VRG currently has no right to
22 access the Roseville Site, which is owned in fee by JEM1. Further, VRG does not have immediate
23 access to or possession of investigation, characterization or monitoring reports, workplans and Regional
24 Board responses to workplans, corrective action plans or Regional Board responses to corrective action
25 plans, or other historical information or data critical to assessing current circumstances, and proceeding
26 with efficient and effective implementation of clean up activities. Compounding these issues, unlike the

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28 ⁵ Neither ASI nor VRG had any meaningful contact with the Roseville Site after 1985, until the Regional Board solicited last
November 2007 VRG's comments on draft versions of the Orders, which it then ignored without explaining why or
responding to the comments.

1 Regional Board, VRG has no enforcement authority to compel RPMS to cooperate with VRG in
2 organizing and implementing clean up activities, and while VRG may be contractually entitled to
3 performance of those activities by RPMS, VRG's only recourse against RPMS to enforce its contractual
4 rights is via civil litigation, which is not a timely, efficient or particularly effective remedy for purposes
5 of achieving cleanup action. In fact, VRG has only recently located RPMS in order to effect delivery of
6 a letter demanding that RPMS honor its contractual duties and responsibilities with respect to clean up
7 of the Roseville Site. As a result, the Orders have created a situation where RPMS has incentive *to fail*
8 to perform, to assure that VRG must step in to take over clean up efforts that RPMS has both a
9 regulatory and contractual duty to perform. At the same time, the compliance schedule set forth in the
10 Orders, and particularly the June 6, 2008 deadline, does not provide sufficient time for VRG to attain
11 access, review information and data, and meet with other potentially responsible parties as necessary to
12 properly implement cleanup activities at the Roseville Site.

13 **C. A Number of Procedural Errors Occurred in Issuance of the Orders, Which**
14 **Aversely Affected the Interests of VRG and Deprived VRG of Due Process.**

15 A number of procedural errors occurred in issuance of the Orders, adversely affecting the
16 interests of VRG and depriving VRG of due process. For example, VRG was provided less than a
17 month to comment upon the Draft Orders November 2007 on a site for which records were difficult to
18 obtain because the site was last operated by one of VRG's subsidiaries over 23 years ago. The Regional
19 Board also failed to provide responses to VRG's November 2007 letter and instead issued the order
20 without final notice to VRG that it intended to do so. Additionally, the final Orders were issued without
21 VRG having an opportunity to meet with and negotiate a solution with the other Dischargers prior to the
22 Regional Board issuance of final Order – had the Dischargers negotiated a resolution to the
23 contamination at the Site, there would be no need for the Orders and this appeal. Moreover, the
24 Assistant Executive Officer also issued the Orders without permitting VRG to present evidence that it
25 should not be a primary responsible party to the Orders – while VRG understands that an “ex parte”
26 Orders are appropriate for Orders that address an imminent threat to human health and the environment,
27 no such condition existed at this site. Finally, the Regional Board issued Orders that contain time
28 scheduled requirements without VRG's input, which are impossible for VRG to meet because of its

1 unfamiliarity of the Roseville Site and the technical studies that have been conducted over the past
2 several years.

3 In improperly naming VRG as a Discharger, the Regional Board has exposed VRG assets to
4 liability for cleanup costs, that would be otherwise protected from environmental liability by both legal
5 principles under Porter-Cologne and by contractual and indemnity provisions granted by RPMS. In
6 addition, the mandated compliance schedule set forth in the Orders, which VRG cannot feasibly meet,
7 expose VRG's assets, and though improbable, potentially VRG's liberty interests to inappropriate
8 liability for satisfaction of civil and criminal enforcement penalties that might be assessed by the
9 Regional Board beginning as early as June 6, 2008. Moreover, requiring VRG to cover the same ground
10 already covered by RPMS in existing site characterization and investigation reports and workplans
11 violates the step-by-step process and consideration of economics and efficiency mandated in clean-up
12 efforts by State Board policy. (*See, e.g.*, State Board Policy 92-49 at ¶ III.B).

13 **V. MANNER IN WHICH PETITIONER IS AGGRIEVED** (Cal. Code Regs., tit. 23, § 2050,
14 subd. (a)(5)).

15 The Orders, as drafted, require VRG to participate in site investigations, monitoring, sampling
16 and cleanup activities that are duplicative of RPMS. VRG should be designated as a secondarily
17 responsible party and only be required to fulfill the requirements of the Orders if the primarily
18 responsible parties, RPMS and JEM1, are unable or unwilling to fulfill their obligations under the
19 Orders, after appropriate enforcement action against those other responsible parties have been
20 completed.

21 **VI. REQUESTED ACTION** (Cal. Code Regs., tit. 23, §§ 2050, subd. (a)(6)).

22 In addition to granting VRG's concurrently filed request to stay, VRG respectfully requests that
23 the State Board take one of the following actions to address the concerns raised above:

24 (1) Amend the terms, conditions and requirements of the Orders, including those provisions
25 related to responsible party status, the compliance schedule, and the cleanup targets, (as to VRG only) as
26 necessary to clarify that VRG is not responsible for implementing the requirements of the Orders, unless
27 and until RPMS or entities related to RPMS fail to do so, at which time an achievable and non-
28 duplicative cleanup targets and compliance deadlines will be established for VRG's performance, taking

1 into account limitations on VRG's ability to participate based on the lack of relationship between VRG
2 and RPMS, and its predecessor in interest, EZ-Serve, VRG's attenuated relationship to the Roseville
3 Site, and its lack of immediate access to critical documents, information and data regarding the site, and
4 the contamination.

5 (2) To the extent that the State Board declines to amend or revise the terms of the Orders as
6 requested above, as soon as possible or practicable, remand this matter and VRG's requested
7 amendments to the Regional Board with specific instructions to schedule an evidentiary hearing before
8 the Board for the next regularly scheduled Regional Board hearing so that the Regional Board can
9 consider the comments and testimony of the parties named in these Orders, an order with clean-up
10 targets and schedule that are attainable, fair and supported by substantial evidence in the record.

11 **VII. STATEMENT OF POINTS AND AUTHORITIES** (Cal. Code Regs., tit. 23, § 2050,
12 subd. (a)(7)).

13 *See below.*

14 **VIII. REGIONAL BOARD NOTIFICATION** (Cal. Code Regs., tit. 23, § 2050, subd. (a)(8)).

15 Simultaneous with the timely filing of this Petition, a copy has been sent to the Regional Board
16 and RPMS and JEM1.

17 **IX. VRG RAISED THE ISSUES BEFORE THE REGIONAL BOARD** (Cal. Code Regs., tit. 23,
18 § 2050, subd. (a)(9)).

19 VRG raised the issues discussed in this Petition in its November 15, 2007 comment letter to the
20 Regional Board's Draft CAO, which is attached hereto as Exhibit A. The Regional Board did not
21 respond to VRG's comments and did not hold a hearing before the Board prior to issuing the Orders.
22 Since receiving the Orders, VRG unsuccessfully attempted to contact the Regional Board's Executive
23 Officer to seek review and revision of the Orders as applied to VRG. The Regional Board Executive
24 Officer indicated that she was prohibited from being involved in any review of the CAO, and referred
25 VRG to her subordinate staff for resolution. (Stroud Declaration, ¶6). The UST Program Manager at
26 the Regional Board informed VRG that Regional Board staff was neither willing to entertain VRG's
27 requested revisions, nor defer the compliance schedule in the Orders until the Orders could be heard by
28 the Board. (Stroud Decl., ¶¶6, 7). In fact, Regional Board staff indicated that VRG should go ahead and

1 file this Petition. (Letter dated May 2, 2008 from Brian Newman to Darren Stroud, which is attached
2 hereto as Exhibit F; Stroud Decl., ¶6, 7).

3 **X. RESERVATION OF RIGHTS** (Cal. Code Regs., tit. 23, § 2050.5, subd. (d)).

4 VRG reserves the right to supplement the existing record with new information found following
5 the filing of the petition or received from the Regional Board that is essential for the State Board's
6 review.
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I. INTRODUCTION AND BACKGROUND.

A. Introduction.

As discussed above, the Regional Board's Orders would require VRG to engage in costly and duplicative site investigations, monitoring, sampling and cleanup activities that have been and continue to be taken by RPMS. Because VRG's subsidiary entered into a contract with RPMS's predecessor in interest that transferred the assets, lease and environmental liability for the Roseville Site to RPMS and its predecessor in interest, its legal obligation for the contamination at the Roseville Site does not ripen unless and until RPMS defaults on its obligations. While the Regional Board staff told VRG that it believes that RPMS is the primarily responsible party for the Roseville Site and that RPMS will complete the required cleanup activities, it nonetheless issued the Orders without designating VRG as a secondarily responsible party. The Regional Board staff apparently was not satisfied with the progress of RPMS to date at the Roseville Site, and as a result, named VRG as a discharger to put pressure on RPMS to expedite cleanup of the Site. While VRG is willing to cooperate with the Regional Board, requiring VRG to comply with the requirements of an order that another responsible party is willing and able to complete is inconsistent with the California Water Code § 13000 *et seq.* and State Board Policy 92-49.

As such, VRG Appeals the Orders on three grounds:

(1) The Regional Board should have designated RPMS and JEM1 as the primary responsible parties under applicable law, regulation and guidance based on a proper consideration of factors applicable and relevant to the designation of responsible party status. RMPS is the direct successor in interest to EZ-Serve, the party primarily responsible for the condition of pollution at the Site. RPMS has been and continues to perform investigation, characterization, and clean up work at the Roseville Site, and has access to the Roseville Site, site information, reports and data, and UST funds for that purpose. RPMS obligated under statutes, regulations and contractual provisions to perform the work. JEM1 is the current property owner and successor in interest to the fee owner of the Roseville Site at the time of discharge. VRG should be designated as a secondarily responsible party;

1 (2) The compliance schedule in the Orders, and particularly the initial compliance date of
2 June 6, 2008, is infeasible for VRG to comply with, because *inter alia*, the compliance schedule
3 mandates performance of substantial remediation work only sixty-two days after the Orders were issued
4 and less than sixty days after VRG received notice that the Orders were issued. The time scheduled tasks
5 are not appropriate for VRG (but may be appropriate for RPMS) because, *inter alia*, VRG has no
6 background with the Roseville Site and must review volumes of historic monitoring reports and action
7 plans prior to developing a new clean up plan, must seek the approval of the clean up plans with the
8 Regional Board and must negotiate a site access agreement; and

9 (3) VRG's interests were harmed by a number of procedural errors made in issuing the
10 Orders, including the Regional Board's failure to adequately respond to VRG's comments on draft
11 versions of the Orders prior to finally issuing them, and its failure to provide VRG with an opportunity
12 for an evidentiary hearing before the Board.

13 **B. Background and Issues.**

14 The designation of VRG as a primary responsible party was unexpected based on the facts and
15 history at the Roseville Site because, among other things, VRG is not the successor in interest to the fee
16 owners of the property. Instead, VRG is the successor in interest to ASI, which was a relatively short-
17 term tenant at the Roseville Site. Further, in 1985 (well before the date that Valero Energy Corporation
18 ("Valero") became the parent entity for ASI),⁶ ASI transferred to EZ-Serve all its rights, duties, and
19 liabilities as a tenant of, and operator at the Roseville Site, including expressly and unequivocally all
20 environmental liabilities and duties related to the Roseville Site and ASI's operations at the Site.
21 Further, EZ-Serve, which is now succeeded in interest by RPMS, granted an express indemnity for all
22 environmental liability associated with the Roseville Site to ASI, and ASI's successors and assigns,
23 including VRG. Finally, during the period from at least 1985, when ASI transferred to EZ-Serve all its
24 rights, duties, and liabilities, to the present date, RPMS or its predecessor in interest, EZ-Serve, have
25 conducted all of the site investigation, monitoring, sampling, characterization, clean-up activities at the
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⁶ See CAO § 3, page 1, and the November 15, 2007 Letter and attached title-related documents.

1 Roseville Site and have obtained approximately \$500,000 in remediation funding from the UST Cleanup
2 Fund for those purposes and potentially is still eligible for another \$1,000,000 from the Fund.⁷

3 According to Regional Board Staff, VRG was named as a Discharger under the Orders, in large
4 measure, as a means of putting pressure on the apparently recalcitrant RPMS, which Regional Board
5 Staff has, until recently, classified as the primarily responsible party to perform site investigation,
6 monitoring, sampling, characterization, and remediation at the Roseville Site. (*See e-mail from Paul*
7 *Saunders to Darren Stroud* dated October 26, 2007, attached hereto as Exhibit C). The designation of
8 RPMS as primarily responsible for remediation of the Roseville Site has been appropriate because
9 RPMS is the direct successor in interest to EZ-Serve, which was the entity that both assumed all
10 environmental responsibility and liability for the Roseville Site in 1985, and was responsible for the
11 major release of hydrocarbons discovered at the site in 1992, which release has most prominently
12 contributed to the current "condition of pollution" on the Roseville Site. (*See* CAO §§ 3, 5, and 6, pages
13 1-2).⁸ In addition, to date, RPMS has been funding and performing its clean-up duties at the Roseville
14 Site as the primarily responsible party, albeit perhaps more slowly than desired by Regional Board staff.
15 In fact, the Orders indicate that contamination levels have fallen significantly at the Roseville Site over
16 time, and there is no indication in the Orders that any surface or groundwater beneficial use is currently
17 imperiled by the existing petroleum constituents within the soil and groundwater.

18 VRG supports the Regional Board's expressed goal of holding RPMS to its environmental
19 responsibilities at the Roseville Site, the Regional Board does not need to accomplish this goal by
20 requiring VRG to take on the same responsibilities as an existing Discharger, such as RPMS, that has

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22 ⁷ See CAO §§ 3, 6, 9 and 12, pages 1-2 and 4.

23 ⁸ Notwithstanding the rudimentary factual allegations made in CAO §§ 4-5, at page 2, it is not clear whether the predecessor
24 of VRG, ASI, significantly caused or contributed to the current condition of pollution identified at the Roseville Site so
25 as to justify being named as a "Discharger" under the CAO with clean-up obligations equal to those of RPMS. (*See*
26 *Attachments to November 15, 2007 Letter*). The ASI spill in 1983 was quite limited nature and duration (698 gallons
27 over a three month period in the immediate vicinity of a relatively small fuel line leak.) Moreover, monitoring well data
28 from the mid-1980s shows non-detects or a "minute quantity" of petroleum in groundwater in the immediate vicinity of
ASI's, and a geohydrologic study conducted by ASI indicated minimal risk of adverse impacts to groundwater and soils
resulted from the release. Additionally, the amount of the spill, estimated from sales records, may be overstated as a
result of failure to consider fuel loss associated with fuel lost as vapor to the atmosphere during dispensing, leakage from
the nozzle before and after vehicle fueling, or inaccurate calibration of the pumps. Moreover, any fuel spilled in 1983
has had approximately 25 years to naturally attenuate and vaporize from the soil to the air. Thus, there is insufficient
evidence in the record that the current site contamination was caused by anything other than EZ-Serve and their long
term operation of, releases from, and abandonment of three underground storage tanks at the Roseville Site.

1 been conducting site investigations, monitoring, sampling and cleanup activities since 1992. (*See, e.g.*,
2 November 15, 2007 letter, attached hereto as Exhibit A). RPMS is responsible from a regulatory
3 perspective to the Regional Board, and is contractually responsible to VRG for ensuring that discharges
4 and resulting contamination at the Roseville Site are cleaned up in accordance with all applicable laws.
5 VRG is willing to cooperate with the Regional Board to assure that RPMS fulfills its contractual
6 obligation to VRG and its regulatory obligations to the Regional Board. Indeed, VRG is already putting
7 pressure on RPMS to live up to its obligations, and it will continue to do so. (*See* April 28, 2008 letter
8 from Darren W. Stroud, Environmental Counsel, VRG to Mr. Jack Ceccarelli, President, RPMS,
9 attached hereto as Exhibit D). In addition, as other Valero companies have done in the past, VRG is
10 ready and willing to meet with the Regional Board and other potentially responsible parties to assist in
11 organizing and assuring that contractual and regulatory clean-up duties are properly performed for the
12 Roseville Site.

13 While VRG wants to continue to work productively with the Regional Board to assure that
14 RPMS closes the Roseville Site properly, the Regional Board's action in naming VRG as a Discharger,
15 with identical responsibilities and the same compliance schedule under the Orders as RPMS, actually
16 limits the incentive that RPMS has to perform its remedial obligations and reduces the leverage that VRG
17 can bring to bear on RPMS to encourage compliance. Under the CAO as currently structured by the
18 Regional Board, VRG and RPMS are equally liable for, and mandated to conduct all necessary remedial
19 activities. As a result, for the first time in the history of remediation of the Roseville Site, which extends
20 back to at least 1984, EZ-Serve and its successor in interest, RPMS, have an incentive not to perform,
21 and safety net if they refuse to do so, in that VRG has now been designated equally responsible to
22 implement the requirements of the Order, and within the same timeframes as the currently operating
23 remediating party.

24 In addition, the Orders place VRG in a procedurally untenable position, unfairly exposing VRG
25 to liability for civil and criminal penalties as early as June 6, 2008 for any RPMS failure to comply with
26 Regional Board requirements. VRG's position is procedurally untenable because it appears that the
27
28

1 Final Orders may have been issued by the Assistant Executive Officer on April 3, 2008.⁹ Despite prior
2 correspondence with the Regional Board in late 2007 regarding its comments on the Draft CAO, VRG
3 did not receive any notice prior to April 3, 2008 that its November 15, 2007 comment letter had been
4 disregarded by Regional Board staff, or that the Final Orders were about to be issued. In fact,
5 environmental personnel at VRG did not actually learn that the final Orders had been issued until April
6 11, 2008, though Valero's mail department apparently received copies of the Orders as early as April 7,
7 2008. Under Cal. Water Code § 13330, VRG was nonetheless required to appeal the Orders to the State
8 Board no later than May 5, 2008 to ensure that such an appeal is timely filed. While VRG prefers to
9 reach agreement with the Regional Board regarding implementation of the Orders, VRG could not risk
10 losing its right to appeal the Orders because VRG cannot feasibly meet the compliance schedule set
11 forth in the Orders (which requires, among other things, that VRG -- as a Discharger -- submit to the
12 Regional Board a full site history and a revised corrective action plan, and VRG must also implement
13 the existing corrective action plan by June 6, 2008).

14 VRG's exposure to enforcement action and regulatory liability as early as June 6, 2008, for
15 failure to meet the specified compliance schedule, is unfair because the Regional Board knows that VRG
16 has only an attenuated relationship to the Roseville Site, and any secondary discharge by ASI. ASI's
17 contribution to the contamination at the Roseville Site is at most, negligible. As stated in the CAO, a
18 conservative estimate of 698 gallons of petroleum product leaked from a filling line (and not from the
19 UST) over a three month period in late 1983. (See CAO §§ 5 and 6, page 2). However, it is unlikely
20 that a substantial portion of the 698 gallons of petroleum product from the filling line impacted the soil
21 and groundwater beneath the Roseville Site. According to environmental reports recently found by
22 VRG, the product released from the filling line leak likely traveled through nearby utility conduits to
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24 ⁹ The actual date of issuance of the Orders is unclear. The Orders that can currently be obtained from GeoTracker indicate
25 that the original was signed by Jack Del Conte, Assistant Executive Officer, and are dated June 3, 2008. Alternatively,
26 the Orders received by VRG at its corporate headquarters in San Antonio on April 7, 2008 are dated April 3, 2008. VRG
27 believes that the date of the Orders available on GeoTracker were incorrect, and therefore assume that the 30-day period
28 for appeal to the State Board set forth in Cal. Water Code § 13330 will expire on May 5, 2008. While the recent May 2
denial by Regional Board Staff of VRG's request for extension and amendment of the Orders, and a hearing on the
Orders by the Regional Board may constitute a new action for purposes of petitioning the Regional Board, VRG cannot
risk availing itself of an additional 30-day period, commencing May 2, 2008, to prepare an appeal because it cannot meet
the June 6, 2008 compliance deadlines currently specified in the Order, and risks enforcement unless its Request for Stay
is reviewed and considered by the State Board quickly, and even before expiration of the 60-day period during which
State Board may review pending appeals.